

***DEQ (Performance Track) Policy - 12/11/2002-DRAFT-suggested comments from individual workgroup members – DEQ adjustments***

**Scope**

This policy provides guidance for the implementation of the Utah Department of Environmental Quality's (DEQ) (Performance Track) Program.

**Program Structure**

(Performance Track) is a voluntary program designed to recognize and reward facilities or entities that are willing to take steps, beyond those required by rule or statute, to prevent or reduce pollution.

The program is divided into three tiers. Requirements, recognition and incentives are tier-based.

**1. Tier One - Entry Level:** Entity<sup>1</sup> completes an initial application and, once accepted, develops and implements an Environmental Management System (EMS).<sup>2</sup> An EMS must be completed and operational within two years of being accepted into the program. Incentives at this level are limited to technical assistance in developing an EMS and to designation on the DEQ website and other publicity as one who is interested in and has started the (Performance Track) process.

**2. Tier Two -** Applicant is accepted, based on a compliance review, on the fact that the EMS has been implemented for one full cycle<sup>3</sup>, and on the strength of projects to improve environmental performance. A multi-interest review panel makes recommendation for

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<sup>1</sup> **Comment Received:** I like that the "entity" can be defined by the company. Whatever the company defines as the entity, then they will submit EMS for that entity. In Red Hanger's case, it would be all stores as the same entity. For Chevron, they could choose what parts they would like to apply for.

<sup>2</sup> **Comment Received:** These are envisioned as being fairly simple. Perhaps they could be available on the website, either linked to the facility's own website (see last sentence this section) or on the DEQ website itself, linked as the DAQ ITA's, draft Title V's and issued Title V's are currently. And/or circulate the applications to the multi- interest review panel. I would like it in the written policy, written policy is much more durable & credible. I think demonstrating openness from the outset is important for credibility. It might be well for entities to be comfortable with public awareness of their participation in Performance Track from the get-go. Providing access to info about applications gives the public an opportunity to bring forward information and perspectives that may be relevant to the decision of DEQ.

<sup>3</sup> **Comment Received:** One full cycle is confusing, perhaps someone can write a brief definition. Having a footnote to define it is adequate to my mind. **(Proposed Definition: An EMS is a full or continual cycle of planning, implementing, reviewing and improving the processes and actions that an organization undertakes to meet its business and environmental goals. Most are built on the "Plan, Do, Check, Act" model which leads to continual improvement based upon: (1) Planning, including identifying environmental aspects and establishing goals [plan]; (2) Implementing, including training and operational controls [do]; (3) Checking, including monitoring and corrective action [check]; and (4) Reviewing, including progress reviews and acting to make needed changes to the EMS [act].)**

advancement into this tier based on defined criteria. Applicant is eligible for the incentive package.

Advancement to Tier Three is not necessary. Participants may remain in Tier Two as long as they are actively working approved projects, are ~~continuing~~ **following** their EMS implementation, and are meeting all eligibility requirements.<sup>4</sup>

Participants will be required to submit an annual report<sup>5</sup> documenting their progress.<sup>6</sup> Once a project is logically completed, a new project must be proposed and approved to maintain Tier Two status. DEQ reserves the right to conduct site visits and/or to request additional documentation to verify a project's status. DEQ may also request appropriate documentation of an EMS and/or make site visits to verify its implementation.

**3. Tier Three** - Applicant is accepted, based on a compliance review, on the fact that the requirements of Tier Two have been met for at least three years and on the strength of a proposed capstone environmental project. In addition, Tier Three participants are encouraged to participate in a mentoring program<sup>7</sup>. A multi-interest review panel makes recommendation for advancement into this tier, based on defined criteria.

Participants may remain in Tier Three as long as they are actively working on approved projects, are continuing their EMS implementation, and are meeting all eligibility requirements.

Participants will be required to submit an annual report<sup>8</sup> documenting their progress. Once a project is logically completed, a new project must be proposed and approved to maintain Tier Three status. DEQ reserves the right to conduct site visits and/or to request additional documentation to verify a project's status. DEQ may also request appropriate documentation of an EMS and/or make site visits to verify its implementation.

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<sup>4</sup> **Comment Received:** Is it possible to remain in tier 2 over time without having to work on approved projects? In other words, if a company enters tier 2 at a high level of compliance, will they be removed if they don't go even higher? Or can they maintain that high bar of compliance that they entered at and stay at that level over time and maintain level 2 status. I seem to recall that this was more for level 3 in previous meetings.

<sup>5</sup> **Comment Received:** What is this?

<sup>6</sup> **Comment Received:** An opportunity for public out reach would be posting those reports to a web site. If the facility or entity has a website, that can be linked to the list DEQ maintains (see last sentence 1.Tier One, above) I would like it in the written policy, written policy is much more durable & credible. I think demonstrating openness from the outset is important for credibility. It might be well for entities to be comfortable with public awareness of their participation in Performance Track from the get-go. Providing access to info about applications gives the public an opportunity to bring forward information and perspectives that may be relevant to the decision of DEQ

<sup>7</sup> **Comment Received:** Who mentors whom? I'll assume the defined criteria for advancement into this tier will be well thought out. That's where public input can help.

<sup>8</sup> **Comment Received:** What is this?

## Eligibility

Any facility or entity governed by applicable federal, state, or local environmental regulations is eligible to participate provided they:

A - have not been in Significant Noncompliance, had a High Priority Violation, had a Severity Level I, II, or III Violation, or the equivalent violation for one year or three ~~equivalent violations~~ in three years<sup>9</sup>.

B - have not had any criminal violations of environmental regulations for the past five years and are not currently the focus of an **environmental** criminal investigation.<sup>10</sup>

C- have no other open or unresolved violation(s)<sup>11</sup>.

In addition, the facility or entity will not have a pattern of noncompliance that would reflect past practices that are inconsistent with the aims of this program. To make this determination, the following will be considered:

- Prior attitudes of willfulness and/or negligence with regards to compliance with environmental requirements. Factors to be considered include how much control the facility or entity had over the foresee-ability of events and whether representatives made or could have made reasonable efforts to prevent violations.

- Lack of good faith efforts to resolve issues. Good faith takes into account the openness in dealing with violations, the promptness in correction of problems, and the degree of cooperation with the State to include accessibility to information and the amount of State effort historically needed to bring the source into compliance.

- Previous violations and the resource costs to the State to address these issues.<sup>1213</sup>

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<sup>9</sup> **Comment Received:** Are these comparable violations?

<sup>10</sup> **Comment Received:** I like inserting the word "Environmental" in regards to the criminal investigations and violations. Other litigation matters should not effect eligibility.

<sup>11</sup> **Comment Received:** What if a NOV is being appealed?

<sup>12</sup> **Comment Received:** I would vote to leave the section on "Pattern of Non-Compliance" out. My reason would be it may be hard to quantify "attitudes of negligence". People might have different views on the same topic, who is right? Some people might not know and/or understand all the aspects of certain situations, and their impacts. I can just see a very large "gray area" here, and don't think it is needed. I like it better how it is now, just much easier as I see it.

<sup>13</sup> **Comment Received:** Spoke with Marv Maxell and Bill Sinclair today. Both seem to think that some type of language about a pattern of noncompliance which indicates a "sloppy shop" in the performance track program is desirable. Marv says that for air sources that are not federally regulated, there can be entities that do not have high priority violations but yet are not really suitable candidates. He named the sand and gravel industry & construction as categories where these type of issues might arise. Also there is a time period when new MACT standards are anticipated where there are sloppy shops that would not be suitable. He guesses that DSHW has similar situations with small generators – I have not followed up on this. Marv says his concern is trying to define "sloppy shop", cause there are some with a pattern of

A company with multiple facilities may apply as a single entity or application may be made for each individual facility. If the application is made on behalf of an individual facility, the *(Performance Track)* designation and the corresponding incentives will only apply to that one facility and not to the company as a whole.

Compliance status will be determined **by** the appropriate DEQ program(s) and in consultation with EPA and the Local Health Department.

Once accepted into *(Performance Track)*, the participant agrees to remain in compliance. Failure to meet A and B above will be grounds for removal.<sup>14</sup> **Eligibility may be continued while properly exercised contests to or appeals of violations are being considered.** Action for other violations may also be taken, including a suspension of incentives until the issue is resolved, based on a recommendation by the appropriate DEQ program.

In making a determination of an appropriate action, the nature of the violation and the circumstances surrounding it will be taken into consideration. The DEQ Deputy Director or ~~his~~ Director's designee must approve the action taken with regard to *(Performance Track)* status.

### **Application Process**

Applications will be **reviewed** on a semi-annual basis.

Applications will be submitted to the DEQ Office of Planning and Public Affairs where they will be reviewed for completeness and for program impact. Copies will be made and distributed to each impacted program. Each program will check compliance status and, where appropriate, will review the proposed project. To be accepted, each program must be in agreement. If acceptance is conditional for any program, those conditions must be spelled out and the conditions resolved within one year.

~~As appropriate,~~ EPA and the Local Health Department ~~may~~ **will** ~~also~~ be consulted to determine compliance status and to comment on proposed projects, **as appropriate**. EPA approval ~~may~~ **will** be needed to receive EPA incentives.

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problems but they look like they are turning the corner, or may turn the corner with some help. There are others that aptitudinally, just don't get it. In my mind, these are the type folks that might see our program as a way to try to put on sheep's clothing, and injure our credibility in the process. Bill Sinclair said enthusiastically that such language would be useful. Just this year they had the case of someone who received a shipment of radioactive material that they shouldn't have and went ahead and tried to use the material to make money, and just created a disposal problem. I add to Marv and Bill's impression that my intuitive sense is that the risk of redundant language seems less than the risk of depriving DEQ of a tool to sort thru applicants in a credible fashion.

<sup>14</sup> ***Comment Received:*** May want to reword this. Any violation will be open for some period of time and this policy should not preclude a company's right to appeal an NOV.

The levels of application include:

1. **Initial Application to Tier One** - Application will include a statement of what the company does, what permits they hold, what their compliance status is, and what they hope to accomplish in the program. DEQ will approve applications at this level.
2. **Application to Tier Two** - Application will document ongoing compliance status, the completion and implementation of an EMS for at least one full cycle, the proposed projects for environmental improvement, requested incentives, and a recommendation for public participation. DEQ staff specialists will make recommendations on the proposed projects, on the EMS, and on the Public Participation proposal. A multi-interest review panel will also generally review applications and make a recommendation, based on defined criteria. DEQ will formally admit or reject an applicant, based on these recommendations.
3. **Application to Tier Three** - Application will document that the requirements of Tier Two have been met for at least three years. A capstone environmental project from one or all the three Core areas must be proposed. A recommendation for public participation and mentoring and the incentives requested will also be included. DEQ staff specialists will make recommendations on the proposed projects, on the EMS, and on the Public Participation and mentoring proposals. A multi-interest review panel will also ~~generally~~ review applications and make a recommendation, based on defined criteria. DEQ will formally admit or reject an applicant, based on these recommendations.

### **Environmental Management System (EMS)**

Participants are required to develop and implement an Environmental Management System. Participants must document an implemented EMS to be considered for Tier Two and Tier Three. In addition to the documentation, DEQ or its designee reserves the right to request a copy of the EMS and/or to make site visits for verification.

Several EMS models currently exist, including ISO-14001, and the applicant is free to select the model which best meets individual circumstances. **The EMS must include a Compliance Audit provision and include** ~~However, any EMS selected must have the~~ following components:

#### **Environmental Policy**

Environmental Policy - A statement of the organization's commitment to the environment. This policy is used as a framework for planning and action.

#### **Planning**

Environmental Aspects - Identify environmental attributes of products, activities and services. Determine those that could have significant impacts on the environment.

Legal and Other Requirements - Identify and ensure access to relevant laws and regulations, as well as other requirements to which the organization adheres.

Objectives and Targets - Establish environmental goals for the organization, in line with the policy, environmental impacts, the views of interested parties and other factors.

Environmental Management Program - Plan actions necessary to achieve objectives and targets.

## **Implementation and Operation**

Structure and Responsibility - Establish roles and responsibilities for environmental management and provide appropriate resources.

Training, Awareness and Competence - Ensure that employees are trained and capable of carrying out environmental responsibilities.

Communication - Establish processes for internal and external communications on environmental management issues.

EMS Documentation - Maintain information on the EMS and related documents.

Document Control - Ensure effective management of procedures and other system documents.

Operational Control - Identify, plan and manage operations and activities in line with policy, objectives and targets.

Emergency Preparedness and Response - Identify potential emergencies and develop procedures for preventing and responding to them.

## **Checking and Corrective Action**

Monitoring and Measurement - Monitor key activities and track performance. Conduct periodic assessments of compliance with legal requirements.

Nonconformance and Corrective and Preventive Action - Identify and correct problems and prevent their recurrence.

Records - Maintain and manage records of EMS performance.

EMS Audit - Periodically verify that the EMS is operating as intended.

## **Management Review**

Management Review - Periodically review the EMS with an eye to continual improvement.

## **Environmental Improvement Projects**

Participation in Tiers Two and Three requires that the applicant work on approved projects designed to reduce or prevent pollution. A project is defined as something that is not required by statute or by rule and that falls within the guidelines listed below. To be eligible, the applicant must propose a project that benefits at least one of the Core areas. DEQ staff specialists will review the project to determine whether it goes beyond compliance, is viable, and whether the timeframe makes sense. The multi-interest review panel will also generally review and make a recommendation on the proposed projects.

### **Core Project Areas**

**Waste Reduction** - The overall goal of the project would be to either reduce the amount of waste being generated or to substitute more harmful products with those that are less harmful to the environment. Projects may fall within any of the following categories:

1. Solid Waste
2. Hazardous Waste
3. Waste Management

**Water Management** - The overall project focus should be on protecting water sources and/or using water more efficiently. Projects may fall within any of the following categories:

1. Storm Water
2. Waste Water
3. Surface Water
4. Ground Water
5. Wetlands
6. Water Conservation
7. Water Efficiency

**Air Emissions** - The focus of projects proposed in this area should be the reduction of pollutants below standards outlined in the permit. ~~Also, applicant could retire banked air emissions.~~

In addition, the applicant must select at least one project from the Suggested list to compliment and augment the Core project. This list is not comprehensive. Other projects may be considered, based on the applicability and environmental benefit.

## **Suggested Project Areas**<sup>15</sup>

### **Transportation Management**

1. Clean fuels and related technology – **Dedicated CNG and zero emission vehicles**
2. Fleet management
3. Trip reduction and consolidation
4. Commuter trip reduction
  - Support use of mass transit
  - Flex schedules, compressed work week
  - Telecommuting

### **Recycling/Reuse**

1. Paper/Office
2. Cardboard
3. Metal
4. **Plastics**
5. **Electronics**
6. **Others** (~~ex – construction materials, road surface materials~~)

### **Procurement**

1. Buy recycled products
2. Purchase less toxic products
3. Look at where production materials are coming from and favor lowest environmental impact
4. Purchase more efficient, more environmentally protective products, ~~where practical~~

### **Energy Conservation**

1. **Purchase or generate** renewable energy
2. Energy efficiency measures **and buildings**
3. Reduce use of electricity/natural gas
4. **Reduction of** greenhouse gases
5. **Reduction of peak power use**

### **Land Use Management**

1. Brownfield or USTfield development
2. **Voluntary cleanup project**
3. **Establish a conservation easement**
4. **Quality Growth Community**
5. **21<sup>st</sup> Century Community**

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<sup>15</sup> **Comment Received:** All good ideas



## Incentives

All (*Performance Track*) participants will be eligible to participate in publicity and an annual meeting with DEQ policy leaders.

Incentives for Tier Two and Three will be negotiated, based on site-specific conditions and the ability of the DEQ program to provide them. The (*Performance Track*) application will include a space for the applicant to indicate the incentives of interest. Incentives may include:

- Selected permit enhancements
- Facility specific incentives
- Recommendation for a reduced percentage or higher priority on loan funds. (This incentive is conditional, based on the approval of the appropriate Board)
- Reduced Oversight **and/or low inspection priority**
- Self audit

In addition, participants may be eligible for incentives offered by EPA under its Performance Track program. Eligibility will be determined as part of the application review process.

In the case of a multi-site company, the incentives may only be used for those facilities that have formally been admitted into (*Performance Track*). The company may not use (*Performance Track*) logos or other designations for company-wide publicity

## Multi-Interest Review Panel<sup>16</sup>

DEQ will appoint a multi-interest public panel to review applications to Tier Two and Tier Three and make recommendations for advancement, based on defined criteria.<sup>17</sup>

The panel will consist of ~~at least~~ one representative<sup>18 19</sup> from:

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<sup>16</sup> **Comment Received:** We need to define how this panel will function. Tamera suggested a unanimous vote to get into the program. I'm ok with that but wondered if that is customary with other states. In that case one member could veto an application. Maybe it could be something like 3/4 of all members must vote to let a company in. Also need to nail down how many members on the panel and from what categories they will come from. If it is not a unanimous vote then there should be an odd number of members on the panel so we don't have a tie vote.

<sup>17</sup> **Comment Received:** You have suggested 10 representatives for the review panel. How many of these rep's need to be present for a quorum? We should consider that at some time; might be that we could postpone and let the panel itself decide, but as I read the list I realized that you could never get that many people in a room at once!

<sup>18</sup> **Comment Received:** Consider size; help retain balance

<sup>19</sup> **Comment Received:** As far as the Board (or Panel) I don't know what a "P2 Association" is, but as I count the anticipated votes on this 10 or more member Board, I see 3 votes for clean air / clean water, 5 votes for industry, and DEQ, which theoretically could go either way. Is this what you want? Is this Panel supposed to be impartial? Clearly "industry", "small business", and "trade association" are all first cousins if not siblings. Local health departments in Utah, as I have seen, favor industry, despite their obligation to public health. If by municipal or county organization you mean government, they do too. Diversity is good,

- Local Health Department
- Municipal or County Organization
- Industry
- Small Business
- Trade Association
- Environmental Group
- P2 Association
- Academia
- Civic Organization
- DEQ

The panel will also recommend an appropriate level of public participation, based on the size of the business and the likely interest in the project. **If the panel approves advancement but the decision is not reached by consensus, the recommendation back to DEQ should include a summary of concerns considered by the group and why the decision made was reached.** If the panel does not recommend advancement into the next Tier, its reason why and what needs to be remedied to allow the application to be favorably considered must be included in its comments.

### **Verification**

Participants must document an implemented EMS to be considered for Tier Two and Tier Three. Participants are also required to submit an annual report to DEQ.<sup>20</sup> DEQ or its designee reserves the right to request a copy of the EMS or to make site visits for verification.

### **Public Participation**

All participants will be required to conduct public outreach activities.<sup>21 22</sup> The nature and complexity of the activities will be determined by the size of the business, the nature of the projects being proposed, and the business' overall environmental impact on the surrounding community. Participants will make outreach recommendations that will be considered and approved as part of the overall application for each Tier.

### **Mentoring**

Tier Three participants are encouraged to design an environmental mentoring component as part of their project proposal. The mentoring proposal will be considered and approved as part of the overall application for Tier Three.

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but I can't miss the fact that this panel is stacked in industry's favor. To have 3 seats on the panel taken by these 3 virtually synonymous descriptions for industry members is NOT what I would call diversity.

<sup>20</sup> **Comment Received:** The required contents of the annual report mentioned here should be described in some detail. The description should include the need for an annual Compliance Certification.

<sup>21</sup> **Comment Received:** Why?

<sup>22</sup> **Comment Received:** I'd like to see a large opportunity for public participation. You're going to have to make it worth their while, because other than a handful of dedicated environmental activists, most people in Utah don't pay any attention.